Nairobi City Water and Sewerage Company Limited v The Monarch Insurance Company Limited (Civil Suit E377 of 2022) [2024] KEHC 847 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 847 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E377 OF 2022

FG MUGAMBI, J

JANUARY 30, 2024

BETWEEN

NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED .. PLAINTIFF

AND

THE MONARCH INSURANCE COMPANY LIMITED .... DEFENDANT

RULING

1. This ruling determines two applications. The first is dated November 18, 2022, filed by the defendants while the second is dated December 20, 2022 and is filed by the plaintiffs. The genesis of the dispute between the parties is an insurance policy referenced as GLA/HDO/2018/060 issued by the defendant to the plaintiff.

2. The policy covered Group Life, Group Personal Accident and WIBA scheme as well as employer's liability covers. It ran from March 13, 2019 to March 11, 2020 and was subsequently renewed for the period commencing March 12, 2020 to March 11, 2021 (all days inclusive). A dispute arose between the parties and the plaintiff filed this suit *vide* a plaint dated 23rd September 2022.

3. The defendant entered appearance on November 18, 2022 and contemporaneously filed a Chamber Summons application under section 6(1) of the *Arbitration Act* seeking stay of the proceedings pending reference of the dispute to arbitration in accordance with the arbitration agreement between the parties.

4. The plaintiff opposed the defendant's application through a replying affidavit sworn by John Juma Njoroge, the plaintiff's insurance supervisor on December 20, 2022. The gist of the plaintiff's case being that while the policy agreements contain an arbitration clause, the same is inapplicable as there was no dispute capable of being referred to arbitration.

5. The plaintiff avers that the defendant has never disputed the claims against it and has in fact admitted to not having settled the claims made by the plaintiff arising from the policy. The admission was unequivocal, clear and unambiguous and it would therefore be unfair to subject the dispute to arbitration.

6. It is also the plaintiff's case that the discharge vouchers issued by the defendant for the amount of Kshs. 115, 998,540/= constitute settlement agreements which are independent from the policy, meaning that the arbitration clause is inapplicable to the said settlement agreements. This position is denied by the defendant vide a supplementary affidavit sworn on 1st February 2023.

7. The plaintiff subsequently filed a Notice of Motion application dated December 20, 2022 seeking summary judgment against the defendant for the amount of Kshs.160,576,860/= or in the alternative for the sum of Ksh. 120,198,540/= or in the alternative, judgment on admission against the defendant for the sum of Ksh.103,984,080/=. The application is supported by the affidavit of John Juma Njoroge, the applicant's Insurance Supervisor, sworn on 20th December 2022 and is premised on the grounds already stated.

8. The defendant opposed the application vide its replying and further affidavits sworn by Rosemary Kangwana, the Manager, Legal Services, and Grounds of Opposition dated March 17, 2023. In addition to the grounds which it intended to adduce during the arbitration proceedings to challenge the plaintiff's claim, the defendant produced an investigation report dated March 3, 2023 which it relies on. The plaintiff terms the report as an afterthought and prays that the same be expunged from the Court record as the defendant is estopped from going back on its admission of the outstanding claims.

Analysis

9. I have carefully considered the pleadings, submissions and evidence laid out by the parties in support of their respective cases. I will start by determining the defendant's application for referral of this dispute to arbitration as its outcome will have a definite outcome on what happens to the plaintiff's application.

10. A good place to begin at is by appreciating the centrality of party autonomy in the *Arbitration Act* (the Act). It is for this reason that the law provides a very limited avenue where this Court may intervene in matters that are subject of arbitration. The strictures of the statutes are well enunciated in section 10 which provides that except as provided in the Act, no court shall intervene in matters governed by the Act.

11. It is an essential pre-requisite of the arbitration law in Kenya that parties to a contract can demand to resort to arbitration so long as there is an arbitration agreement between them and other requirements under section 6 of the *Arbitration Act* are met. It is not disputed in this case that the agreement between the parties does in fact have an arbitration clause. Rule 5 of the agreements stipulates as follows:

> " Any dispute which may arise in respect of any claims and interpretation of these rules shall be decided by Arbitration according to the laws of the Republic of Kenya."

12. The substantive provision under which the defendant sought the courts intervention is section 6 of the *Act*. It provides in part as follows:

> "(I) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or

b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

13. In *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya*, [2001] KLR 12 the Court of Appeal laid out the threshold for consideration of an application brought under section 6 of the Act. The considerations should be:

i. Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;

ii. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and

iii. Whether the suit intended concerned a matter agreed to be referred to arbitration.

14. Fortunately, the only bone of contention is whether there is a dispute capable of being referred to arbitration. I am forewarned even as I proceed with this analysis that this Court must resist every temptation to be drawn into the arena of the dispute between the parties. The converse is also true that the Court must carry out an enquiry and where there is no dispute to be referred to arbitration, make appropriate orders. This was held in *Abdul Aziz Suleiman v South British Insurance Co. Ltd.*, Civil Appeal No. 779 of 1964 [1965] E.A. 66, at Page 70.

15. I do also concur with the finding of this Court in *UAP Provincial Insurance Company Ltd v Michael John Beckett* C.A No. 26 of 2007 that:

> " ...the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute."

16. In order to determine whether there is a dispute herein, a reflection on the legal principles underpinning grant or refusal to grant judgment on admission is critical. The decision of this Court in *Express Automobile Kenya Limited v Kenya Farmers Association Limited & another*, [2020] eKLR as cited in *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others*, [2021] eKLR (Mativo, J), is relevant in this case.

17. In its acknowledgement of the former decision, the Court in the latter decision noted that:

> " ...in law, an admission should reflect a conscious and deliberate act of the person making it, showing an intention to be bound by it. As for the court, the power to enter judgment on admission is not mandatory or peremptory; it is discretionary. The court is bound to examine the facts and prevailing circumstances keeping in mind that a judgment on admission is a judgment without trial which permanently denies a remedy to the sued party by way of an appeal on merits."

18. In *Express Automobile Kenya Limited v Kenya Farmers Association Limited & another* the Court went on to add that:

> "... it therefore follows that unless the admission is clear, unambiguous, unequivocal and/or unconditional, the discretion of the court should not be exercised to deny the valuable right of a sued party to contest the claim."

19. I agree with the plaintiff that the objective of Order 13 rule 2 is to enable a party to obtain speedy judgment where the other party has made a plain admission. Ordinarily, any litigation would therefore be a waste of resources and time. I am however conscious of the reasoning of the Learned Judge in *Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others* on the scenarios when judgment on admission must be denied.

20. The Court was emphatic on the following instances:

> "First, it is wholly inappropriate to permit any party to employ this provision where vexed and complicated questions or issues of law have arisen. Second, the rule however, invests discretion to the court - that is - even if there is an unequivocal admission by a party but the passing of a judgment would cause injustice, judgment ought to be declined. Third, where the defendants have raised objections which go to the very root of the case, it would not be proper to exercise this discretion and pass a decree in favor of the Plaintiff".

21. Applying these principles to the matter at hand, it is a fact that the plaintiff has provided evidence of admission of the claims by the defendant. These include the defendant's letter dated May 4, 2022 addressed to the plaintiff as well as minutes of a meeting held between the plaintiff, the defendant and the defendant's underwriter, on November 26, 2021. On this basis the plaintiff prays that judgment on admission of the debt be entered against the defendant.

22. The defendant now claims that upon investigation, issues have come to the fore which question whether there was non-disclosure of material facts to procure the insurance cover, whether the contract of insurance is valid, whether all the claims related to insured lives, whether all claims related to employees of the plaintiff, whether any deaths were from causes of death excluded by the policy and whether the claims were time barred. There are equally issues around whether Clarkson Insurance Brokers Limited was an agent of the plaintiff, whether the Discharge Vouchers were properly and validly obtained or whether they are voidable.

23. While there does appear to have been an initial admission of the claim by the defendant, this Court cannot ignore the issues that are now being raised. They are weighty and go to the root of the dispute between the parties, making the admission no longer clear, unequivocal and unambiguous. I understand the anxiety by the plaintiff for a speedy judgment. However, looking at the circumstances as a whole, it may not be safe and just to pass judgment under order 13 rule 2.

24. It is also outside the scope of this Court to enquire into the veracity of the allegations by the defendant. The proper forum for such an enquiry is as agreed by the parties and is before an arbitrator. Rule 5 of the policy agreement provides that the arbitration shall proceed in accordance with the laws of Kenya.

25. Section 11 of the *Arbitration Act* provides that the parties to an agreement are entitled to appoint an arbitrator and the process of appointment is provided for in section 12 of the Act. Section 12 of the Act recognizes party autonomy by giving each party an opportunity to participate in the appointment of the arbitrator. That means that in the absence of any provision for the appointment of an arbitrator

in Rule 5, the Court can only descend in the arena where the parties fail to agree on an arbitrator as provided for under Section 12(3)(a) and (b).

Determination

26. The long and short of this is that the plaintiff's application dated December 20, 2022 seeking summary judgment against the defendant fails.

27. Conversely, the defendant's application dated November 18, 2022 seeking stay of the proceedings herein pending reference of the dispute to arbitration is successful.

28. Parties shall proceed and appoint an arbitrator within 45 days from the date of these orders. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE